KOSMA PALM OIL MILL SDN BHD & ORS

v.

KOPERASI SERBAUSAHA MAKMUR BHD

FEDERAL COURT, KUALA LUMPUR
MOHD NOOR AHMAD FCJ
RAHMAH HUSSAIN FCJ
AUGUSTINE PAUL JCA
[APPLICATION NO: 08-98-2003-C]
22 AUGUST 2003

CIVIL PROCEDURE: *Stay of execution - Application for - Principles applicable - Whether nugatoriness an example of special circumstances - Whether there was risk of assets being disposed of - Whether losses recoverable if appeal successful - Whether special circumstances established*

This was the applicants' motion for a stay of execution of a High Court order allowing the respondents' application for consequential relief over certain estate lands *ie*, for the *status quo* of the parties to remain as of the time prior to the signing of four agreements between the parties. The applicants argued that their motion was grounded on special circumstances and that the nugatory approach was not a matter that required consideration. Thus, the issues requiring consideration were the law in relation to stay of executions and whether or not the grounds advanced in support of the motion justified the stay of execution being granted.

Held:
Per Augustine Paul JCA

[1] There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one; it is an example of special circumstances. As nugatoriness is a species of special circumstances, a mere reference to it is sufficient to convey the correct legal impression, and any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds upon which an applicant may rely. Therefore, the applicants were wrong in submitting that the nugatory approach was not a matter for consideration in this case and

that only the special circumstances approach was relevant. They would have been correct if they had said that they were not relying on nugatoriness but on some other species of special circumstances. (p 16 b, d-e)

[2] Based on the affidavits filed by both parties and the arguments advanced by them in court, the applicants' motion could be disposed of on two grounds. Firstly, the respondents alleged that the applicants had attempted to sell off the estate lands that were registered in their name. The respondents averred in their affidavit that this claim was supported by a newspaper article which had been exhibited in previous proceedings between the parties. Since this allegation was unrebutted by the applicants, it was therefore accepted as true. Hence, there was a risk that the applicants would dispose of the assets if the stay were granted, and in such a situation the court may, in the exercise of its discretion, refuse to grant a stay. (p 18 b-c)

[3] Secondly, the applicants went to great lengths to highlight the losses they would suffer and the inconvenience they would incur if the operation of the consequential order obtained by the respondents were not stayed. This line of reasoning militated against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment; it is not to give the unsuccessful party time to satisfy the judgment or to alleviate its problems. The applicants ought to have focussed on the inability of the respondents, if at all, to reinstate them to their original position should they be successful in the appeal. They failed to do as such. On the contrary, since the estate lands were worth a considerable sum of money, it was assumed that the losses suffered by the applicants, being quantifiable, could be recovered from the respondents should they lose in the appeal. (pp 18 d & f)

[4] Therefore, the applicants did not succeed in establishing the existence of special circumstances in support of the motion. (p 19 b-d)

[Applicants' motion for stay of execution dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah usul oleh pemohon-pemohon untuk penggantungan perlaksanaan perintah Mahkamah Tinggi kerana membenarkan permohonan responden untuk mendapatkan relif sampingan ke atas beberapa tanah estet yang tertentu iaitu untuk *status quo* pihak-pihak tersebut dikekalkan mengikut waktu sebelum empat perjanjian antara pihak-pihak tersebut ditandatangani. Pemohon-pemohon telah berhujah bahawa usul mereka telah diasaskan atas

keadaan-keadaan khas dan bahawa pendekatan sia-sia (nugatory) itu bukannya satu perkara yang memerlukan pertimbangan. Oleh itu, isu-isu yang memerlukan pertimbangan adalah undang-undang berkaitan dengan penggantungan perlaksanaan dan sama ada alasan-alasan yang dikemukakan bagi menyokong usul mewajarkan pemberian penggantungan perlaksanaan.

Diputuskan:
Oleh Augustine Paul HMR

[1] Terdapat banyak faktor-faktor yang boleh membentuk keadaan-keadaan khas dan hakikat bahawa sesuatu rayuan akan menjadi sia-sia jika penggantungan ditolak adalah yang paling lazim; ia adalah satu contoh keadaan-keadaan khas. Oleh sebab kesesiaan adalah satu spesi keadaan-keadaan khas, suatu rujukan semata-mata kepadanya adalah memadai untuk menyampaikan tanggapan undang-undang yang betul, dan sebarang percubaan untuk menghadkan pemberian satu penggantungan kepada kesesiaan, selain dari tidak wajar, akan sesungguhnya menghadkan alasan-alasan di atas mana pemohon boleh bergantung. Oleh itu, pemohon-pemohon salah dalam berhujah bahawa pendekatan sia-sia bukannya suatu perkara untuk pertimbangan dalam kes ini dan bahawa hanya pendekatan keadaan-keadaan khas adalah relevan. Mereka tentunya betul jika mereka telah menyatakan bahawa mereka tidak bergantung pada kesesiaan tetapi atas spesi keadaan-keadaan khas yang lain.

[2] Berdasarkan afidavit-afidavit yang telah difailkan oleh kedua-dua pihak dan hujahan-hujahan yang dikemukakan oleh mereka dalam mahkamah, usul pemohon-pemohon boleh diselesaikan atas dua alasan. Pertamanya, responden-responden mendakwa bahawa pemohon-pemohon telah cuba untuk menjual tanah-tanah estet tersebut yang berdaftar atas nama mereka. Responden-responden menegaskan di dalam afidavit-afidavit mereka bahawa dakwaan ini disokong oleh satu rencana akhbar yang mana telah dieksibit dalam prosiding-prosiding yang lalu di antara mereka. Oleh sebab dakwaan ini telah tidak dipatahkan oleh pemohon-pemohon, ia dengan itu harus diterima sebagai benar. Oleh itu, terdapat risiko bahawa pemohon-pemohon akan melupuskan aset-aset tersebut jika penggantungan diberikan, dan dalam situasi sedemikian mahkamah boleh, dalam melaksanakan budibicaranya, menolak untuk memberikan penggantungan.

[3] Keduanya, pemohon-pemohon telah bersusah-payah menyerlahkan kerugian-kerugian dan kesusahan-kesusahan yang akan dialami oleh mereka jika pelaksanaan perintah sampingan yang diperolehi oleh responden-responden tidak digantung. Hujahan sebegini adalah bertentangan dengan rasional bahawa sesuatu penggantungan diberikan hanya atas alasan-alasan yang berkaitan dengan penguatkuasaan penghakiman; ia bukan untuk memberikan masa kepada pihak yang tidak berjaya untuk melaksanakan penghakiman tersebut atau untuk mengurangkan masalahnya. Pemohon-pemohon seharusnya memberi tumpuan kepada ketidak-upayaan responden-responden, jika ada, untuk menempatkan semula mereka kepada kedudukan yang asal sekiranya mereka berjaya di dalam rayuan. Pemohon-pemohon telah gagal untuk melakukan seperti yang sedemikian. Sebaliknya, oleh sebab tanah-tanah estet tersebut amat bernilai, andaian telah dibuat bahawa kerugian-kerugian yang dialami oleh pemohon-pemohon, kerana ianya boleh diperhitungkan, mampu diperoleh semula daripada responden-responden sekiranya mereka kalah di dalam rayuan tersebut.

[4] Dengan itu, pemohon-pemohon gagal membuktikan wujudnya keadaan-keadaan khas bagi menyokong usul tersebut.

Usul pemohon-pemohon untuk penggantungan perlaksanaan ditolak.]

Case(s) referred to:

Ajaib Singh v. Jeffrey Fernandez [1971] 139 ***(refd)***
Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***
Atkins v. GW Ry [1886] 2 TLR 400 ***(refd)***
Broadford v. Young, Re Falconer's Trusts [1884] 28 Ch D 18 ***(refd)***
Cambridge Credit Corporation Ltd v. Alexander & Ors [1985] 9 ACLR 669 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***
Chung Khiaw Bank Bhd Ltd v. Hotel Rasa Sayang [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Desu Rayudu v. AP Public Service Commission AIR [1967] AP 353 ***(refd)***
Dickson Trading (SP Pte Ltd v. Transmarco Ltd [1989] 2 MLJ 408 ***(refd)***
Government of Malaysia v. Datuk Hj Kadir Mohamad Mastan & Another Application [1993] 4 CLJ 98 HC ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***
Leader v. Direction de Disconto Gesellschaft [1915] 3 KB 154 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***

Linotype-Hell Finance Ltd v. Baker [1992] 4 All ER 887 ***(not foll)***
Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 2 MLJ 406 ***(refd)***
Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd [1941] 1 All ER 310 ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(foll)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
Ranken v. Harwood, Ranken v. Boulton [1846] 5 Hare 215 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(foll)***
Robinson & Co v. Continental Insurance Co of Mannheim [1915] 1 KB 155 ***(refd)***
Rosengrens Ltd v. Safe Deposit Centres Ltd (19 July 1984) (unreported) ***(refd)***
Sarwari Ainuddin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 HC ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor [1997] 2 CLJ 299 CA ***(not foll)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Shree Swamiji v. State of Mysore [1963] 2 SCR 226 ***(refd)***
Smith, Hogg & Co Ltd v. The Black Sea and Baltic General Insurance Co Ltd 162 LTR 11 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
TC Trustees Ltd v. JS Darwen [1969] 2 QB 295 ***(refd)***
The Annot Lyle [1886] 11 PD 114 ***(refd)***
Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 CA ***(refd)***
Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2001] 2 CLJ 235 HC ***(refd)***
Wilson v. Church (No 2) [1879] 12 Ch D 454 ***(refd)***
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussain & Anor [1996] 2 CLJ 353 HC ***(refd)***
Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd [2002] 7 MLJ 119 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 17, para 455

For the applicants - Abu Bakar Jais (Helmi Hamzah); M/s Zaid Ibrahim & Co
For the respondents - Mohd Arif Mahindar Abdullah (Sahadin Mohd Taib); M/s Sahadin & Co

[Appeal from Court of Appeal, Civil Appeal No: C-02-547-03 & High Court, Temerloh; Civil Suit No: 22-29-2001]

Reported by Suresh Nathan

JUDGMENT

Augustine Paul JCA:

The applicants entered into four agreements in 1998 for the purchase of certain estate lands from the respondents subject to certain conditions. The respondents are a co-operative society and are the registered owners of the estate lands which were used for the planting and cultivation of oil palm and an oil palm mill was erected on one of the lands. The applicants and the respondents soon had disputes over the completion of the agreements and several legal proceedings were instituted by them. Sometime in 2001 the respondents took over possession of the estate lands. This resulted in the applicants obtaining an interim injunction against the respondents on 26 September 2001. However, the interim injunction was dissolved by the High Court of Temerloh on 2 April 2002 though an Erinford Order was granted in favour of the applicants which resulted in them obtaining possession of the estate lands. The applicants appealed to the Court of Appeal on the dissolution of the interim injunction. It was dismissed on 12 May 2003 and the Erinford Order lapsed. An oral application made by the respondents for consequential relief for possession was refused. The respondents then filed an application in the High Court at Temerloh for consequential relief over the estate lands for the *status quo* of the parties to remain as of the time prior to the signing of the agreements. This application was allowed on 7 July 2003. The High Court dismissed an oral application made by the applicants for a stay of execution. The applicants then appealed to the Court of Appeal on the consequential relief granted by the High Court and also applied for a stay of execution. Both the applications were dismissed by the Court of Appeal on 21 July 2003. The applicants then filed an application for leave to appeal to the Federal Court and a motion for a stay of execution ("the motion") of the order made by the High Court on 7 July 2003 and the Court of Appeal on 21 July 2003.

The motion came up for hearing on 11 August 2003. In his submission learned counsel for the applicants outlined the special circumstances that he relied on in support of the motion. They are as follows:

(i) the decision of the High Court of Temerloh dated 7.7.2003 and the decision of the Court of Appeal dated 21.7.2003 had summarily changed the status quo of the proprietorship and management of the disputed land because the substantive application by the respondent in High Court of Kuantan through civil suit no. 22-45-2002 with regard to the validity of the agreements and vacant possession which has not been disposed off. Further, the Respondent should have invoked Sections 7 and 8 of the Specific Relief Act 1950 (Revised 1974) and Order 89 of the Rules of High Court, 1980 and not to resort to Order 92 rule 4 of the Rules of the High Court in the Respondent's Application 2;

(ii) the decision of the High Court of Temerloh dated 7.7.2003 had summarily denied the Applicants' rights over the disputed lands. The Applicant should remain the proprietor of the land unless the High Court of Kuantan has decided otherwise. The decision of the High Court of Temerloh on 7.7.2003 justifies this application;

(iii) the repercussion of the decision of the High Court of Temerloh dated 7.7.2003 are as follows:

– the Applicants will have to terminate the employment of 100 local workers.

– the Applicants have to send back more than 1000 foreign workers according to the immigration rules. This is because they only have a valid working permit to work with the Applicants.

– there will be breaches of contracts by the Applicants against third parties and Sri Cemerlang Mill Management Sdn Bhd.

– the Applicants will be liable to all of the Respondent's liability as the Respondent's creditors had agreed to novate the Respondent's liability to the Applicant for the sum of RM100 million.

– the Applicants will not be able to settle the debts if there is no stay of execution against the decisions of the High Court of Temerloh dated 7.7.2003 and Court of Appeal dated 21.7.2003. This is because the Applicants generate their income from the disputed estates.

(iv) if *status quo* of both parties before the decision of the High Court of Temerloh on 7.7.2003 is preserved, it will not prejudice any party;

(v) the High Court of Temerloh should have not made a Consequential Order yet. The learned Judicial Commissioner should only make such decision if the High Court of Kuantan has disposed off the Respondent's application for declaration in their favour. In this case, the High Court of Kuantan has not even heard the Respondent's application;

(vi) therefore, the decision of the High Court of Kuantan will become academic and nugatory in the event the Respondent executed the decision of High Court of Temerloh dated 7.7.2003 and the decision of the Court of Appeal dated 21.7.2003;

(vii) the Applicants' application for leave to appeal to this honourable court and notice of appeal to the court of appeal against the decision of the High Court of Kuantan dated 7.7.2003 through Notice of Appeal 1 will also become academic and nugatory;

(viii) the Respondent only initiated the action for Consequential Order and declarations after the Applicants had administered and managed the disputed estates for more than 5 years;

(ix) the Respondent had directed their solicitors not to proceed with the registration of the stamped and executed transfer form with the land office.

In his reply learned counsel for the respondents said that the applicants are RM2 companies. Their assets belong to the respondents. The estate lands were always in their possession with their own employees. It was only in August 2001 that the applicants attempted to take possession of the estate lands and offered employment to the respondents' employees in secret. The income from the estate lands running into millions of ringgit belongs to the respondents. The estimated damages caused by the interim injunction obtained by the applicants is RM144,000,000 as of 7 July 2003. The respondents said that the applicants had abandoned the purpose of corporatization for which they had entered into the agreements and had attempted to sell off the estate lands. A newspaper article that appeared in The Star on 22 December 2001 was annexed to the affidavit of the respondents to support the allegation. The respondents further claimed that when they took possession of the estate lands on 29 July 2003 more than 90% of the workers were not present as they had left the estates. The estates were in a poor state of upkeep. The title of the estate lands is in the name of the respondents. Although there is no valuation of the estate lands it is estimated to be worth between RM300 to RM400 million. Both parties agreed that possession of the estate lands after 1998 is in dispute.

In submitting on the law relating to stay of executions learned counsel for the applicants relied on *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 and *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 to argue that the motion is grounded on special circumstances. He then referred to *Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd* [2002] 7 MLJ 119 where Malik Ishak J said at p. 148:

> In essence, by virtue of the doctrine of stare decisis, the courts are bound by the Federal Court decision of *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 (FC), and *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 MLJ 701 (FC), to adopt the 'special circumstances' approach. Thus, with respect, the Court of Appeal's decision in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 (CA), which applied the 'nugatory' approach should be rejected. I had in *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49, while applying the principle of stare decisis had applied the 'special circumstances' approach. My learned brother Mohd Hishamudin J also adopted a similar view in *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ Supp 79. Thus, it is now well settled that it is the 'special circumstances' approach that should be adopted and applied.

In view of the stand adopted by learned counsel in his argument on the special circumstances and nugatory tests based on the authorities he referred to I asked him to explain the relationship between both these approaches. He said that the nugatory approach is not a matter for consideration and that what is relevant is only the special circumstances. This would appear to be consistent with the views expressed by Malik Ishak J and Mohd Hishamudin J when they rejected the nugatory approach. The preference of one approach in favour of the other can be further seen in the write-up in the *Malaysian Court Practice* where it says at pp. 3771-3772:

> Some courts have shown a preference for the nugatory test in deciding whether to grant a stay of execution pending appeal, ie that the appeal would be rendered nugatory if the stay is not granted; see *Ban Lee Sdn Bhd v. Renganathan Narayanan* [1998] 3 CLJ Supp 425; *H & R Johnson Tiles Ltd & Anor v. H & R Johnson (Malaysia) Bhd* [1998] 3 CLJ Supp 441; *Perwira Affin Bank Ltd v. KI Production Sdn Bhd* [2000] 4 CLJ 482 at 484 (a stay was granted pending disposal of an appeal against an order for sale in foreclosure proceedings where, *inter alia*, as land had a special value, the decision of the Court of Appeal would be rendered nugatory if the stay was refused). Where this ground is pleaded, the court may take into account the merits of the appeal: *Tsen Kyun Tshin v. Lee Tse Khiong* [1998] 3 CLJ 148, HC (the application was dismissed as based on the evidence, the appeal was bound to fail).

> However, other courts have stated that the test to be applied in an application for a stay of execution is the special circumstances test, following the Federal Court's decision in *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161, and not the nugatory test. See also *Bidang Cerdas Sdn Bhd v. Sayfol Management Sdn Bhd* [1998] 2 CLJ Supp 7, HC; *Paganelli Sdn Bhd v. Care-Me Direct Sales Sdn Bhd* [1999] 2 CLJ 669, HC. The special circumstances must be explained in the affidavit supporting the application, not brought up only at submissions: *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 CLJ Supp 79, HC.

The view expressed by learned counsel on the law relating to stay of executions and the prevailing view in some quarters make it necessary for me to first determine its propriety to facilitate a lawful appraisal of the grounds advanced in support of the motion. This, in essence, would entail a consideration of the relationship between the special circumstances and nugatory approaches.

The general rule is that an appeal shall not operate as a stay of execution unless the Court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:

> But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it.

This is a re-statement of the common law rule explained in *The Annot Lyle* [1886] 11 PD 114 where Lord Esher MR said at p. 116:

> … that an appeal shall be no stay of proceedings except the court may so order. We are asked to depart from this rule, although it is admitted that there are no special circumstances in this case which afford a ground for so doing. If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for other good reason, this must be shewn by affidavit, and may form a ground for ordering a stay. To grant the present application would, in the absence of special circumstances, clearly be to act contrary to the provisions and intention of the Rules of Court.

The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well established in this country. See, for example, the Federal Court cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995]

2 CLJ 701 and *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161. There are numerous other cases which have adopted this test. See, for example, *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86; *Ajaib Singh v. Jeffrey Fernandez* [1971] 139; *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406; *Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors* [1985] 2 MLJ 406; *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 and *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussain & Anor* [1996] 2 CLJ 353. However, the need to show special circumstances to justify a stay was declared as bad law in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 where Gopal Sri Ram JCA, after having referred to *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408, *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 and *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42, said at pp. 605-606:

> At one time it was thought that an appellant had to demonstrate that there were special circumstances warranting a stay of proceedings or of execution. This was founded on the notion that a successful litigant ought not to be deprived of the fruits of his litigation. See the case of *The Annot Lyle* [1886] 11 PD 114. The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this court.

His Lordship then said at p. 610:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceeding, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s. 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.

The declaration that the need to establish special circumstances in an application for a stay is bad law warrants serious consideration as it departs from established authorities. In *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 Abdul Hamid Mohamad JCA (as he then was) said at p. 404:

> First, *See Teow Guan* declares 'special circumstances' as bad law and should no longer be followed. With respect, I do not think that the Court of Appeal can do so, particularly in view of the Federal Court judgments in *Re Kong Tai Sawmill (Miri) Sdn Bhd, Jasanusa Sdn Bhd* and *Dato' Hj Ghani Gilong.*

For my part I shall first refer to the authorities cited in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 to demolish special circumstances as bad law. In *Dickson Trading (S) Pte Ltd v. Transmarco Ltd* [1989] 2 MLJ 408 what was in issue was not the special circumstances test. The submission made in that case, based on *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116, was that it was not sufficient that the plaintiffs could not be restored to their original position: there must also be other grounds, eg, that there were merits in the appeal. It is the latter part of the judgment of Brown J that Chan Sek Keong JC rejected to hold that the likelihood of an appeal, if successful, being rendered nugatory, is a sufficient ground on its own for a stay of execution. The learned judge is correct in his ruling and nowhere did he refer to or reject the special circumstances test. In *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 it was held that one of the determining factors that calls for consideration is whether by not making an order to stay the execution it would make the appeal, if successful, nugatory in that it would deprive an appellant of the results of the appeal. It merely states that one of the determining factors in considering an application for stay is nugatoriness. This clearly means that there must be other factors which must, as of necessity, come under some form of classification. Though the judgment does not refer to the classification specifically as special circumstances a proper appreciation of the relationship between the two concepts (as I will soon explain) will reveal that it is anchored on the premise of special circumstances. It is therefore not a rejection of the special circumstances test. In *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42 Kirby P said that instead of special circumstances it is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion as the legislature has not said so in terms.

It must be observed that the legislation in question in that case accords with the one in *The Annot Lyle* [1886] 11 PD 114 (as stated in *Cambridge Credit Corporation Ltd v. Alexander & Ors* [1985] 9 ACLR 669) where it was held that the absence of special circumstances would go against the provisions and intention of the Rules of Court. Kirby P's views which give a different interpretation to a rule of Court cannot be accepted for two reasons. Firstly, since the general rule is that a stay should not be granted any exception carved out of it certainly requires something more than an ordinary reason. This interpretation is consistent with established rules of construction. It is obvious that an exception to a general rule cannot be interpreted so as to nullify or destroy the rule itself (see *Desu Rayudu v. AP Public Service Commission* AIR 1967 AP 353). It cannot swallow the general rule (see *Shree Swamiji v. State of Mysore* [1963] 2 SCR 226). The grant of a stay for any ordinary reason will have just that effect and destroy the general rule that there shall be no stay. Thus I agree with Ramly Ali JC (as he then was) who said in *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi bin Mohd Salleh* [2001] 2 CLJ 235 that there must be "strong justification" for a party to come within an exception to a general rule. It is for this reason that Esher MR said *The Annot Lyle* [1886] 11 PD 114 that the granting of a stay, in the absence of special circumstances, would be acting contrary to the provisions and intention of the rules of court. Secondly, *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42 is a 1985 Australian judgment. Section 3(1) of the Civil Law Act 1956 provides that save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia the court shall in West Malaysia apply the common law of England and the rules of equity as administered in England on 7 April 1956. Even developments in English common law after that date are not automatically applicable in Malaysia (see *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57). The need to prove special circumstances before a stay of execution can be granted is English common law that has been adopted in this country. It is not appropriate to override such law by Australian common law that was developed in 1985. Thus the authorities relied on in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 do not support the conclusion arrived at to declare special circumstances as bad law.

CLJ

Be that as it may, it is my misfortune to say that the description of the special circumstances test in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 as bad law stems from a misunderstanding of the relationship between the concepts of special circumstances and nugatoriness. An appreciation of the meaning of the phrase "special circumstances" may resolve the confusion. As Ian HC Chin JC (as he then was) said in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Case* [1993] 4 CLJ 98 at pp. 101-102:

> An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86, *viz:*
>
> > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
>
> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

The resultant matter for determination are the factors or reasons that may constitute special circumstances. Generally stated they are circumstances which go to the enforcement of the judgment (see *Sarwari a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [1999] 8 CLJ 534). With regard to the specific factors that constitute special circumstances I refer again to *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and Another Case* [1993] 4 CLJ 98 where Ian HC Chin JC (as he then was) said at p. 101:

> What, then, constitute special circumstances? It was said in *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126, at p. 127, that:
>
> > One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

In *Smith, Hogg & Co Ltd v. The Black Sea and Baltic General Insurance Co Ltd* 162 LTR 11 Scott LJ said at p. 12:

> The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject-matter of the action or deprive the appellant of the means of prosecuting the appeal.

In *Rosengrens Ltd v. Safe Deposit Centres Ltd* (unreported, 19 July 1984, CA, Lexis Nexis) Dillon LJ said:

> The most common special circumstance is, normally no doubt, that it would be doubtful whether, if the judgment was enforced, the defendant would get his money back if the appeal subsequently succeeded. But there are others as, for instance, if there is a likelihood that the money the subject of the judgment, if paid over, would go to a foreign jurisdiction where the defendant would have difficulty recovering it.

Finally, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 Lee Hun Hoe CJ (Borneo) in writing for the Federal Court said in clear and lucid terms at p. 132:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v. Church (No 2)* [1879] 12 Ch D 454. Another example is that payment of a judgment debt would destroy the substratum of the appeal: *Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310. However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v Bartram* [1891] 1 QB 346.

Halsbury's Laws of England 4th edn, vol 17 at para 455 cites the following authorities as examples of special circumstances: that an appeal would be nugatory if stay was refused, by reason of the respondent's poverty (*Wilson v. Church (No 2)* [1879] 12 Ch D 454, CA); or if payment of a judgment debt destroys the substratum of the appeal (*Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310, CA); absence from England without address of a party to whom money in court was ordered to be paid out (*Broadford v. Young, Re Falconer's Trusts* [1884] 28 Ch D 18, CA); that an administration order has been made against the estate or a debtor dead since judgment and before execution

issued (*Ranken v. Harwood, Ranken v. Boulton* [1846] 5 Hare 215); judgment in favour of an alien enemy (*Robinson & Co v. Continental Insurance Co of Mannheim* [1915] 1 KB 155; and judgment against an alien enemy company whose assets are subject to Treasury control (*Leader v. Direction de Disconto Gesellschaft* [1915] 3 KB 154, CA). It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 could have withstood scrutiny if it had merely referred to nugatoriness without rejecting special circumstances. As nugatoriness is a species of special circumstances a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an applicant may rely. Learned counsel for the applicants is therefore wrong in submitting that the nugatory approach is not a matter for consideration in this case as what is relevant is only the special circumstances. He would have been correct if he had said that he was not relying on nugatoriness but on some other species of special circumstances.

Having expressed my views on the law I shall now consider the motion. Both parties delved into some length on the merits of their respective case in the affidavits filed and the submission made in court. The merits of a party's case in a stay application is not a relevant matter for consideration. In this regard Lord Denning MR said in *TC Trustees Ltd v. JS Darwen* [1969] 2 QB 295 at p. 302:

> In this very case the defendants, in their affidavit under RSC Ord 14 did raise a plea for equitable relief. But it was overruled, and judgment given against the defendants. It is not permissible to renew it again on an application for a stay of execution. ...
>
> It is true that the courts have an inherent jurisdiction to stay proceedings, but only on grounds which are relevant to a stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for those must be raised in the action itself.

> Mr Lipfriend raised a further point. He said that under RSC Ord 47 r. 1, there is power, in the case of a writ of fi fa, or elegit, to stay proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. I think that is appropriate here. The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness.

As Abdul Hamid Mohamad JCA (as he then was) said in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 at p. 403:

> The weight of authorities appears to me to say that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

Lee Hun Hoe CJ (Borneo) said in the Federal Court in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Lin Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 at p. 132:

> Allegations that there has been misdirection that the verdict of judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the court will grant the application. See *Monk v. Bartram* [1891] 1 QB 346.

It is therefore unnecessary for me to consider the merits of the respective case of the applicants and respondents.

The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* [1886] 11 PD 114). This issue was dealt with articulately by Malik Ishak J in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 at p. 356:

> I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not solvent and this assumption is clearly borned *(sic)* out by his affidavit in encl 45.

In my opinion the motion can be disposed of on two grounds based on the affidavits filed by both parties and the arguments advanced by them in court. Firstly, the respondents alleged that the applicants had attempted to sell off the estate lands which are registered in their name. This claim was supported by a newspaper article and the respondents averred in their affidavit that the article had been exhibited in the previous proceedings between the parties. This allegation was not rebutted by the applicants. It must therefore be accepted as true. There is therefore a risk that if the stay is granted the applicants may dispose off the assets. In such a situation the court may, in the exercise of its discretion, refuse to grant a stay (see *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42). Secondly, the applicants went to great lengths to highlight the losses they will suffer and the inconvenience they will incur if the operation of the consequential order obtained by the respondents is not stayed. They will have to terminate the employment of 100 local workers and send back more than 1000 foreign workers. There will be breaches of contracts by them against third parties and Sri Cemerlang Mill Management Sdn Bhd. They will be liable to all of the respondents' creditors as there was a novation of the respondents' liability to the applicants for the sum of RM100 million. The applicants contended that they will not be able to settle the debts if the motion is not granted as they generate their income from the disputed lands. It is clear that the applicants have highlighted only the problems that they will encounter if the motion is not successful. This line of reasoning militates against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment. It is not granted to give the unsuccessful party time to satisfy the judgment or to alleviate his problems. As Abdul Hamid Mohamad JCA (as he then was) said in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 at p. 407:

> The grounds relied on by the appellants are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

I am therefore unable to accept *Linotype-Hell Finance Ltd v. Baker* [1992] 4 All ER 887 where it was held that if an unsuccessful defendant seeks a stay of execution pending an appeal it is a legitimate ground for granting the application if he is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. Thus the applicants ought to have focussed on the inability of the respondents, if at all, to re-instate them to their original position should they be successful in the appeal. There must be an affidavit showing that if the losses are incurred there is no reasonable prospect of them being reimbursed if the appeal succeeds (see *Atkins v. GW Ry* [1886] 2 TLR 400). This they did not do. On the contrary it must be observed that the estate lands are worth a considerable sum of money. As a matter of fact when learned counsel for the applicants was submitting my learned brother Mohd Noor Ahmad FCJ commented that the respondents are in a position to pay damages if they are unsuccessful in the appeal. There was no response to this very pertinent and relevant observation. In the circumstances it can be assumed that the losses suffered by the applicants, being quantifiable, could be recovered from the respondents should they lose in the appeal (see *Tropiland Sdn Bhd v. DCB Bank Bhd & Ors* [2000] 1 CLJ 568).

In the upshot it is my view that the applicants have not succeeded in establishing the existence of special circumstances in support of the motion which must therefore be dismissed with costs.

My learned brother Mohd Noor Ahmad FCJ and my learned sister Rahmah Hussain FCJ have read this judgment in its draft form and agree with it.